BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL L. ARCHER	)	
Claimant	)	
VS.	)	
	)	Docket No. 223,575
BERRY TRACTOR & EQUIPMENT CO.	)	
Respondent	)	
AND	)	
	)	
ITT HARTFORD INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requested Appeals Board review of Pamela J. Fuller's June 18, 2001, Decision. The Appeals Board heard oral argument on December 18, 2001.

APPEARANCES

Seth G. Valerius of Topeka, Kansas, appeared on behalf of claimant. Richard J. Liby of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board (Board) has considered the record and adopted the stipulations listed in the Decision.

ISSUES

This is a claim for a July 18, 1995, work-related accident and resulting neck injury. Claimant injured his neck while working for the respondent and notified his supervisor immediately after the accident. Respondent provided medical treatment for claimant's neck injury through Myron J. Zeller, M.D., the physician who contracted with respondent to treat respondent's employees for work-related injuries. Dr. Zeller provided conservative treatment for claimant's neck injury and on July 25, 1995, released claimant for regular duty.

Claimant appeals the Administrative Law Judge's (ALJ) finding that he is not entitled to workers compensation benefits because he failed to serve a timely written claim for

compensation on respondent.[1] Claimant contends he provided respondent with a timely written claim when he returned from Dr. Zeller's office on July 25, 1995, and provided his supervisor with a Medical Treatment Request//Work Restriction Report (hereinafter referred to as Medical Report) completed, in part, by the respondent and, in part, by Dr. Zeller.

Conversely, respondent requests the Board to affirm the ALJ's Decision. Respondent argues that the ALJ's finding that the Medical Report does not meet the requirement of a written claim for compensation is correct and is supported by the record.

At oral argument, the parties agreed that if the Board should find claimant did serve a timely written claim for compensation on respondent, then the Board should also decide the issue of nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the parties' arguments, the Board makes the following findings and conclusions:

Did claimant serve respondent with a timely written claim for compensation?

The parties stipulated to the following facts relevant in deciding the timely written claim issue: (1) Claimant suffered a work-related accidental injury on July 18, 1995; (2) Respondent failed to file an Employer's Report of Accident with the Director within 28 days of the July 18, 1995 accident; (3) The last medical expense paid by respondent's insurance carrier on claimant's behalf occurred on November 16, 1995, and; (4) Claimant did not file his Application for Hearing with the Division of Workers Compensation until June 17, 1997.

Respondent argues that claimant's claim for workers compensation benefits is barred because he failed to timely serve a written claim for benefits on respondent. Respondent contends that claimant had one year from November 16, 1995, the date respondent's insurance carrier last made a payment on behalf of the claimant for medical expenses to serve claimant with a timely written claim for compensation and failed to do so.[2] Respondent argues that the only claim for compensation that claimant served upon respondent was the Application for Hearing that was filed with the Division on June 17, 1997, more than one year from the November 16, 1995, date when respondent's insurance carrier last paid medical expenses on behalf of the claimant.

---

[1] *See* K.S.A. 44-520a (1993 Furse).

[2] *See* K.S.A. 44-557(c) (1993 Furse). *See also* Odell v. United School District, 206 Kan. 752, 481 P.2d (1971). (holding that medical expenses are compensation under the workers compensation act, and payment of those expenses extends the time for written claim).

But claimant contends, that under the facts and circumstances of this case, the completed Medical Report satisfied the written claim requirement.

After claimant injured his neck on July 18, 1995, he notified his supervisor of the injury and his supervisor sent him for treatment to Dr. Zeller's office. Claimant was examined by Dr. Zeller. Dr. Zeller diagnosed claimant with a strained neck, prescribed pain medication, physical therapy, and returned claimant to work with restrictions and instructed claimant to return in one week on July 25, 1995. All that information was contained in the Medical Report form signed by Dr. Zeller. Claimant returned to respondent with the Medical Report and gave the report to his supervisor. Claimant testified that when he delivered the Medical Report to the respondent he expected that the recommended physical therapy treatment would be furnished and that respondent would likewise provide him with accommodated employment within the temporary imposed restrictions.

One of the purposes of the written claim requirement is to enable the employer to know about the injury in time to investigate it.[3] The same purpose or function has been ascribed to the requirement of for notice found in K.S.A. 44-520.[4] Another purpose of the written claim statute is to require the employee to make a positive claim in writing, if he or she desires to recover under the workers compensation act.[5] The written claim is, however, one step beyond notice in that an intent to ask the employer to pay compensation is required.[6] But a written claim for compensation need not take on any particular form so long as it is in fact a claim.[7]

The Board finds the completed Medical Report contains sufficient written information to constitute a written claim for compensation and was delivered to the respondent by the claimant with the intent to receive workers compensation benefits.

The Board finds this conclusion is supported by claimant's testimony. Claimant timely notified respondent of his work-related injury on the date of injury July 18, 1995, and he was provided with medical treatment for that injury on the same date. As a result of that notice, respondent sent claimant for examination and medical treatment to its authorized physician who contracted with respondent to treat respondent's employees for work-related injuries. Dr. Zeller prescribed a certain regimen of conservative treatment, along with

---

[3] *See* Craig v. Electrolux Corporation, 212 Kan. 75, 82, 510 P.2d 138 (1975).

[4] *See* Pike v. Gas Service Co., 223 Kan. 408, 573 P.2d 1055 (1978).

[5] *See* Ricker v. Yellow Transit Freight Lines, Inc., 191 Kan. 151, 379 P.2d 279 (1963).

[6] *See* Fitzwater v. Boeing Air Plane Co., 181 Kan. 158, 166, 309 P.2d 681 (1957).

[7] *See* Ours v. Lackey, 213 Kan. 72, 515 P. 2d, 1071 (1973).

temporary restrictions that he communicated to the respondent in writing as a result of claimant's neck injury. Claimant then returned to respondent and presented his supervisor with Dr. Zeller's Medical Report that contained Dr. Zeller's diagnosis, treatment recommendations and temporary restrictions. Claimant testified that, as a result of delivering the Medical Report form, he expected that the physical therapy treatment would be provided and that respondent also would return him to work in an accommodated position within the temporary restrictions. Thus, by the time claimant returned to the respondent with Dr. Zeller's Medical Report, respondent had to have a basic understanding that claimant had suffered a work-related injury and was requesting compensation, including medical compensation, for that injury under the workers compensation act.

What is the Nature and Extent of Claimant's Disability?

Although claimant received physical therapy, his neck remained symptomatic and claimant continued to have numbness in his right hand. He did not return to see Dr. Zeller, however, until he suffered another work-related accident while employed by the respondent on October 30, 1996. As a result of the October 30, 1996, accident, claimant again injured his neck and this time also his right shoulder. He saw Dr. Zeller on December 3, 1996, with pain in his right shoulder and neck. Dr. Zeller's impression was strain of the neck and right shoulder with concerns of possible cervical nerve root impingement. Claimant was scheduled for an MRI examination and was referred to orthopedic surgeon Dr. C. Reiff Brown for treatment recommendations.

At the time claimant was examined by Dr. Brown on December 11, 1996, he found the MRI scan showed what appeared to be a herniated disc at C5-6, on the right. Dr. Brown also found claimant with a right shoulder rotator cuff tear. Claimant was then seen by neurosurgeon Dr. Paul Stein, who examined claimant's cervical injury, but advised that no surgery was indicated. Claimant's right shoulder injury was treated by a Dr. Neal, who dismissed claimant from treatment in June 1999, as claimant was successfully performing his usual work activities.

Dr. Brown last saw claimant on May 12, 2000. Because of the two separate accidents, there was some confusion on Dr. Brown's part concerning the appropriate functional impairment rating to apportion between the July 18, 1995, cervical injury and the October 30, 1996, cervical injury. But Dr. Brown finally opined, based on the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised) (AMA Guides), that as the result of the July 18, 1995, injury, claimant had an 8 percent permanent functional impairment.[8]

[8] On claimant's July 18, 1995, accident date, K.S.A. 44-510e (1993 Furse) required the AMA Guides, Third Edition (Revised) be used in determining an injured worker's functional impairment.

On cross examination by respondent's attorney, Dr. Brown testified he arrived at the 8 percent rating by assuming that one half of the claimant's loss of the range of motion in the cervical spine resulted from the July 18, 1995, injury for a 4 percent impairment rating and the other 4 percent impairment rating was based on the presence of a cervical degenerative disc. Dr. Brown admitted there were no range of motion findings in the medical records before claimant's October 30, 1996, injury. He was then asked the question, "So you are just speculating on what you think his range of motion the [sic] might have been, correct?" Dr. Brown answered, "Yes".[9]

The Board is mindful that Dr. Zeller also testified and he opined that he released claimant from the July 1995 injury with no restrictions and no permanent functional impairment. Dr. Zeller, however, also would not disagree that claimant could have continued to have pain and discomfort in his neck after he was released. In addition, Dr. Zeller expressed that he always has a concern with a spinal-type injury because the injury could be more severe than it appears. He deferred to Dr. Brown's opinion, on the question, of what if any amount of permanent functional impairment claimant suffered as a result of the July 18, 1995, injury.

The Board finds Dr. Brown's impairment of function opinion as a result of claimant's July 18, 1995, injury is persuasive, but only in regard to the 4 percent rating he assessed according to the AMA Guides for the presence of a cervical degenerative disc. The other 4 percent was assessed for range of motion loss. But Dr. Brown admitted that because the medical records did not contain any range of motion findings before the October 30, 1996, injury, that any impairment assessed as a result of a range of motion loss for the July 18, 1995, injury would be speculation on his part. Thus, the Board concludes claimant is entitled to a 4 percent permanent partial general disability award based on functional impairment for a July 18, 1995, work-related injury.

Because claimant suffered an intervening accident and resulting cervical injury on October 30, 1996, claimant's attorney at the regular hearing withdrew his request for future medical treatment for the July 18, 1995, accident.

The parties did not stipulate to claimant's average gross weekly wage. But they did stipulate that the claimant, on the date of his accident, July 18, 1995, was earning $12.00 per hour. The respondent did not present any arguments that claimant was a part-time employee. Thus, the Board finds claimant's average weekly wage for a full time employee would be 40 hours at $12.00 per hour or $480 00.

No temporary total disability compensation was paid or requested.

---

[9] Deposition of C. Reiff Brown, M.D., April 11, 2001, p. 33.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Pamela J. Fuller's June 18, 2001, Decision, should be, and is hereby, reversed and an award is entered as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Michael L. Archer and against the respondent, Berry Tractor & Equipment Co., and its insurance carrier, ITT Hartford Insurance Company, for an accidental injury sustained on July 18, 1995, and based upon the average weekly wage of $480.

Claimant is entitled to 16.60 weeks of permanent partial disability compensation at the rate of $320.02 per week for a 4 percent permanent partial general disability, making a total award of $5,312.33, which is all due and owing and is ordered paid in one lump sum less any amount previously paid.

Claimant is entitled to the unauthorized medical expense up to the statutory maximum of $500.

Respondent is ordered to pay all reasonable and necessary medical expenses as authorized medical.

The Board adopts all remaining orders contained in the Award.

IT IS SO ORDERED.

Dated this ____ day of January 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Seth G. Valerius, Attorney for Claimant
Richard J. Liby, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Workers Compensation Director